No. 84-1279 (3)

In The

Supreme Court of the United States

October Term, 1984

STATE OF DELAWARE,
Petitioner

v.

ROBERT E. VAN ARSDALL,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under the Confrontation Clause, when a prosecution witness relates facts which the defendant has conceded, does an erroneous restriction of the defendant's cross-examination of that witness require reversal without consideration of the harmlessness of the error?[1]

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[1]The principal parties in the Delaware Supreme Court were the STATE OF DELAWARE, Petitioner, and ROBERT E. VAN ARSDALL, Respondent. Additionally, the Delaware Supreme Court permitted the GANNETT COMPANY, INC., publisher of the Wilmington, Delaware newspapers *The Morning News* and *The Evening Journal*, to intervene as a party on the issue of the trial court's refusal to grant Van Arsdall's request to close the pretrial proceedings. Because that issue was not resolved by the Delaware Supreme Court and is not presented in this case, GANNETT has not been named as a party in this Court.

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OPINION BELOW

The opinion of the Supreme Court of Delaware (Pet. App. A-1) is officially reported at 486 A.2d 1 (Del. 1984).

JURISDICTION

The judgment of the Delaware Supreme Court, reversing respondent's first-degree murder and weapons

convictions, was entered on November 19, 1984. The petitioner's timely motion for a rehearing before the Delaware Supreme Court, sitting *en banc,* was denied December 12, 1984 (Pet. App. B-1). A petition for certiorari was filed on February 7, 1985 and granted on July 2, 1985. 105 S.Ct. 3552 (1985). The jurisdiction of this Court rests on 28 U.S.C. §1257(3). Although the judgment below vacated the convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of the federal issue now presented. *Florida v. Meyers,* 104 S.Ct. 1852, 1853 n.* (1984) (per curiam); *California v. Stewart,* 384 U.S. 436, 497, 498 n. 71 (1966) (decided with *Miranda v. Arizona*).

CONSTITUTIONAL PROVISION INVOLVED

1. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

2. Although not directly involved in the question presented, the following provisions of the Delaware code were involved in the prosecution and are reproduced in Pet. App. at C-1. Del. Code Ann. tit. 11, §§ 271(2)(b), 636(a)(1), 1447 (1979); Del. Code Ann. tit. 21, § 4149 (1979).

STATEMENT OF THE CASE

A jury found Robert E. Van Arsdall guilty of murdering Doris Epps in the apartment of his friend, Daniel Pregent, in the early morning hours of January 1, 1982.[2] On appeal, the Delaware Supreme Court determined that the trial court had impermissibly, under the Confrontation Clause, restricted the defense cross-examination of Robert Fleetwood, a prosecution witness. Refusing to make any inquiry concerning whether Fleetwood's testimony merely echoed facts conceded by the defense, the Delaware court then reversed the conviction, holding that this type of Confrontation Clause error could never be found harmless. The question presented by this petition is whether the Confrontation Clause requires such a remedy of automatic reversal.

1. The Killing

Pregent and Fleetwood lived across the hall from each other in a small apartment house in Smyrna, Delaware.[3] On December 31, 1981, they decided to have an

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[2]Del. Code Ann. tit. 11, § 636(a)(1) (1979) [Pet. App. C-1]. Van Arsdall was also convicted of possessing a deadly weapon, a knife, during the murder. Del. Code Ann. tit. 11, § 1447 (1979) [Pet. App. C-1]. The position of the prosecution was that Van Arsdall, either singly or jointly with Pregent, killed Epps. Del. Code Ann. tit. 11, § 271(2)(b) (1979) (accomplice liability) [Pet. App. C-1].

[3]Citations to the trial transcript (Tr.) will be by volume and page number, followed by the witness' name and, where appropriate, reference to the Joint Appendix (JA). The prosecution's trial exhibits will be cited as "S.Exh." with reference to the Joint Appendix.

informal New Year's Eve party. Throughout the late morning and afternoon, people dropped in and mingled in both Fleetwood's and Pregent's apartments. In the early afternoon, Doris Epps appeared, inquiring about renting Fleetwood's soon-to-be vacated apartment. She left shortly afterwards, but returned about 4 p.m. and joined the party. About the time that the revelers were eating dinner, Van Arsdall, an acquaintance of both Pregent and Fleetwood. arrived at the party accompanied by several friends. He remained for a short time and then left. Tr. II91-94, 100-01 (Crain); III44-47 (Fleetwood) (JA76-80); IV11-12, 47-48 (Meinier) (JA122-23).

As the party progressed into the night, it lost much of its jovial nature. Pregent quarreled with one female guest and punched or kicked a hole in a wall. Tr. II95, 108-09 (Crain) (JA67-68); III62-63 (Fleetwood) (JA93-95); IV12-13, 54 (Meinier) (JA123). By 10:30 p.m., Epps had passed out, and Pregent, aided by Robert Crain, carried her into Pregent's sparsely furnished apartment, placing her on a convertible sofa-bed in the combination living room and bedroom. Tr. II111-12 (Crain) (JA70-71). Soon afterwards, Fleetwood ordered most of the people to leave. Fleetwood, Meinier, and Mark Mood, who had arrived shortly before Fleetwood ended the party, continued drinking in Fleetwood's apartment. Tr. III47-49 (Fleetwood) (JA80-82); IV13, 55-56 (Meinier) (JA124-25).

Sometime between 11:00 and 11:30 p.m., Fleetwood walked across the narrow hall and quickly looked into Pregent's apartment through the open door. In the limited portion of the bedroom he could observe, he saw Van Arsdall sitting on the corner of the sofa-bed next to Pregent's feet. Fleetwood did not talk to either man, Tr.

III52 (Fleetwood) (JA85), and no one in the apartment indicated they saw or heard him. Fleetwood then returned to his apartment. Tr. III49-52, 66-68 (Fleetwood) (JA82-85, 97-98).[4]

At 11:53 p.m., Meinier, wondering about the time, stepped across the hallway to look at Pregent's kitchen clock. The living room was dark, and Meinier, after checking the time, returned to Fleetwood's apartment. Tr. IV14, 16 (Meinier) (JA125-27). About an hour later, with Fleetwood asleep, Meinier heard a knock at Fleetwood's door. She opened the door and saw Van Arsdall, holding a bloody knife, his shirt splattered and his hands covered with blood.[5] He told her that "he had gotten in a fight" but that "I got them back." Tr. IV17-21, 61 (Meinier) (JA128-32). Told by Van Arsdall that "there's something wrong across the hall," Meinier looked into Pregent's apartment and saw Epps' body on the kitchen floor. Tr. IV22 (Meinier) (JA132).

When the police arrived several minutes later, they found Epps' disemboweled and mutilated body on Pregent's kitchen floor with the floor covered and surrounding furnishings splashed with blood and tissue. Blood

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[4]Van Arsdall had returned to Pregent's apartment about 11:30 p.m. Tr. X41 (Van Arsdall) (JA141). In the interval between leaving the party in the afternoon and returning to Pregent's, he had been drinking with various people. Tr. X34-39, 77 (Van Arsdall). He had also seen a female acquaintance and had become upset when she refused to go out with him that evening. Tr. III30-32 (Foraker); X80 (Van Arsdall).

[5]Clinging to Van Arsdall's watch was a piece of human tissue. Tr. IV92 (Fortner); VI72 (Lee). The medical examiner concluded, without contradiction, that Epps had been killed between midnight and 1:00 a.m. Tr. II66 (Tobin).

smears led from the sofa-bed to the kitchen. Tr. IV129 (Timmons).—In the darkened living room, police found Pregent wrapped in a blanket on the blood-drenched bed. Tr. IV129-30 (Timmons).

While the police continued their investigation at the apartment, Van Arsdall remarked that he "didn't think it would go like this." Tr. VII70-72, 77 (Montgomery). Later that morning, in a tape-recorded statement, Van Arsdall said he had returned to Pregent's apartment, using the back stairs, about midnight. In the kitchen, Pregent and he had talked while Van Arsdall made sandwiches. Moving into the bedroom, Pregent sat on the sofa-bed while he sat on several cushions arranged on the floor next to the bed. The two continued to talk until Pregent fell asleep. S.Exh. 73 at 11-12 (JA22-23), Tr. X12. Denying that he had engaged in sexual intercourse with Epps, Van Arsdall said he soon went out into the hall for some fresh air, noticing nothing unusual in the apartment. There he was joined by Meinier coming out of Fleetwood's apartment. S.Exh. 73, at 8, 12, 17-18 (JA18, 23, 30). She told him that she had heard a noise, and disregarding his comment that Pregent was asleep, she entered Pregent's apartment. Following her, he saw Epps' body on the kitchen floor, and as he tried to help Epps, he became covered with blood. S.Exh. 73, at 4, 8, 12-13, (JA14, 18-19, 23-24).

Two days later, Van Arsdall recanted much of his earlier statement, telling the police he had lied in order to "cover up" for Pregent. S.Exh. 74, at 1 (JA36), Tr. X12. He now said that he returned to the apartment at 11:30. Pregent lay on the sofa-bed with Eps and he laid on the cushions. S.Exh. 74 at 2, 4 (JA37,

39-40). Now, in a complete turnabout from his first narration, Van Arsdall said that after hearing noises from the bed, he was awakened by Pregent dragging Epps' body past his feet into the kitchen. As he arose to investigate, Pregent hit him. The next thing Van Arsdall saw was Pregent stabbing Epps twice and "then he started cutting on her." S.Exh. 74, at 2, 4 (JA37-38, 39-40). He said he tried to pull Pregent away, but the smaller Pregent had knocked him down. After watching Pregent finish his attack, wash himself off, and return to the bed, Van Arsdall then picked up the knife and went to Fleetwood's apartment, telling its occupants he had just been in a fight. S.Exh. 74, at 2-3 (JA37-39).[6]

2. The Trial

Van Arsdall was tried first for Epps' murder.[7] Before any evidence had been presented, defense counsel, in his opening remarks, said that Van Arsdall would take the stand and "as a witness who actually observed what occurred," tell the jury "that Daniel Pregent was the one who murdered Doris Epps." Tr. II33 (Williams) (JA62). Counsel returned to the idea that Pregent was the sole

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[6]In two statements to the police, Pregent said that he had talked with Van Arsdall in the living room and he had fallen asleep on the sofa-bed. S.Exh. 72 (JA5-9), Tr. X9; S.Exh. 75, at 2, 10 (JA43, 53), Tr. X12-13. The next thing he remembered was being awakened by the police. S.Exh. 75, at 2, 10 (JA43, 53). He recalled briefly going to Fleetwood's apartment when Van Arsdall was in his apartment, and at that time, Epps was alive. S.Exh. 75 at 4-6 (JA46-49). Not until the police took him out of his apartment did he see Epps' body. S.Exh. 75, at 2, 10 (JA43, 53). He denied having or attempting to have sexual intercourse with Epps. S.Exh. 75, at 7, 12 (JA50, 56).

[7]In his subsequent trial, Pregent was acquitted.

killer, and in doing so, admitted that Van Arsdall had been in Pregent's apartment:

> What Bobby Van Arsdall intends to prove in this case is that Danny Pregent, the other individual charged with the same offenses, killed Doris Epps with a kitchen knife. *We intend to prove that this homicide occurred in Danny Pregent's apartment, that Bobby Van Arsdall had returned to that apartment late in the evening of December 31, 1981,* and entered through a back door of the apartment unseen by anyone except Danny Pregent who admitted him, that Bobby Van Arsdall had only met Doris Epps that evening and that for some unknown reason to Bobby Van Arsdall Daniel Pregent repeatedly stabbed and cut the woman.

Tr. II40-41 (Williams) (JA64-65) (emphasis added).[8]

The prosecution's case was composed of three types of evidence. First, several of the party-goers, including Fleetwood and Meinier, and the responding officers testified about the party, the scene after the killing, and Van Arsdall's remarks at the apartment house. Secondly, without objection,[9] the post-arrest statements of Van Ars-

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[8]This concession was not an isolated remark. *See* Tr. II30 (Williams) (describing Epps, Pregent, and Van Arsdall as the only three people "who know what occurred in Daniel Pregent's apartment at the crucial time") (JA60); II38 (Williams) (arrest of Van Arsdall was case "of an innocent young man who had the misfortune to be in the wrong place at the wrong time") (JA63).

[9]Van Arsdall, prior to trial, unsuccessfully sought to suppress his first statement as being involuntary and violative of Delaware's prompt arraignment requirement. The suppression issue was not pursued on appeal. He never objected to the admissibility of his second statement. Although Pregent did not testify, Van Arsdall did not object to the admission of Pregent's statements.

dall and Pregent were played for consideration by the jury. The final portion of the prosecution's case was forensic evidence.

With both sides agreeing that Epps, Van Arsdall, and Pregent were the only people in Pregent's apartment at the time of the murder, the only unresolved question was who had killed Epps. To decipher the blood marks and stains in the apartment and on the clothing of Van Arsdall and Pregent, the prosecution relied on the evidence of a forensic expert. After examining Pregent's clothing, the expert concluded that the various items had no blood on them or that the bloodstains were caused by Pregent's contact with secondary sources of blood, e.g., blood on the floor or a bloodstain on the bed. Tr. VI60-61, 64-66, 109 (Lee).

The bloodstains on Van Arsdall's clothing, including his shoes and socks, told a different story. His shirt had bloodstains that came from a source at a 35 to 40 degree angle below the shirt. Blood had fallen onto the floor and bounced onto his shoes, and one large drop had fallen directly on one shoe, soaking through to the sock. The blood on his pants also had a bounce-back or "rebound" pattern, as well as a pattern resulting from kneeling in a large pool of blood and another stain caused by drops coming down at a 10 to 15 degree angle. Tr. VI34-35, 38, 41, 56-57, 60, 100-04 (Lee). Van Arsdall thus had been facing, in a standing position, a profusely bleeding arterial wound. The expert's conclusions effectively refuted Van Arsdall's account of the movement of Epps' body and the extent of his involvement. Based on the blood on Pregent's furniture and floors, the expert concluded that Van Arsdall initially stabbed Epps while the two of them

stood near the sofa-bed. Epps' body then fell on or was placed on the sofa-bed, and she was later dragged, by her shoulder, into the kitchen where more wounds were inflicted, resulting in a "cast-off pattern" of blood by the swinging of the knife. Tr. VI89-96 (Lee).

a. Fleetwood's Testimony

Called as a witness, Fleetwood, after relating the chronology of the party,[10] described his glimpse into Pregent's apartment near 11:30 p.m.:

> A. I just seen him on the edge of the bed and I seen his feet hanging from the bed.
>
> Q. Whose feet?
>
> A. Danny Pregent's feet hanging from the bed. I mean, that's all I could see was about from here (indicating) down.
>
> Q. What part of the bed would Pregent have been on?
>
> A. He was like on the end of the bed like thisaway (indicating), on the end of it.
>
> Q. And you said you saw who else sitting on the bed?
>
> A. Bobby Van Arsdall.
>
> Q. Did you see anyone else in the apartment at that point?
>
> A. No, I didn't.
>
> Q. Did you see Doris Epps?
>
> A. No, I didn't.

[10]Most of Fleetwood's recitation of the events occurring at the party was consistent with the testimony of Crain and Meinier. *See supra* at 3-5.

> Q. Can you say whether she was there or not?
>
> A. No.

Tr. III50 (Fleetwood) (JA82-83). He did not talk to Van Arsdall or Pregent. After returning to his apartment, he fell asleep about 30 minutes later. Tr. III53 (Fleetwood) (JA85).

Near the end of cross-examination, defense counsel sought to question Fleetwood about his arrest, six weeks prior to trial, for walking drunk on a highway[11] and the subsequent dismissal of that charge after he had indicated that he would speak to the prosecutor the next day about the Epps murder. Tr. III69 (Fleetwood) (JA100). When the prosecutor objected on relevancy grounds, Fleetwood was questioned outside the presence of the jury about the issue. While he said that he understood that the dismissal was entered after he promised to appear the next day in the prosecutor's office to discuss the Epps murder, Fleetwood consistently denied that the dismissal of the traffic charge or his subsequent meeting with the prosecutor had any effect on his testimony. He indicated that he would have assented to the interview in any event and that his trial testimony echoed what he had told the police immediately after the murder. Tr. III71-78 (Fleetwood) (JA101-07).[12]

[11]Del. Code Ann. tit. 21, § 4149 (1979) [Pet. App. at C-1]. The offense is a misdemeanor under Delaware's motor vehicle code.

[12]Van Arsdall also sought to ask Fleetwood about his involvement in the investigation of an unrelated murder (that of Anthony Blake) that had occurred in Smyrna, Delaware in August, 1982. According to defense counsel's offer of proof, the chief investigating officer in the Epps case took Fleetwood to

(Continued on next page)

The trial judge prohibited the cross-examination citing Delaware Rule of Evidence 403. The rule, like its counterpart, Federal Rule of Evidence 403, allows relevant evidence to be excluded if its probative value is outweighed by other trial concerns. Tr. II82 (JA110).

b. Van Arsdall's Testimony

Though Fleetwood (and nine others) had been subpoenaed by the defense, the only defense witness was Van Arsdall whose testimony was an amalgam of the two statements he had given to the police. After telling the jury of his actions during the day, he said that "a few minutes after 11:30," he had returned to Pregent's apartment. Tr. X41-43 (Van Arsdall) (JA141-43). Pregent opened the door, and after some time in the kitchen eating and talking, the two moved into the living room. There, with Van Arsdall sitting on the sofa-bed, they had a drink and continued to talk. Tr. X43-45 (Van Arsdall) (JA143-46). When Pregent's cat came into the room, Van Arsdall "sat on

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(Continued from previous page)

Blake's funeral and questioned him about Blake's murder. Counsel wanted to ask Fleetwood about any bias or interest he might have because of the Blake investigation. Tr. III83-84 (Fleetwood) (JA111-12). On voir dire, Fleetwood denied that he had been offered any deal or promise by anyone in the Blake case in exchange for his testimony at Van Arsdall's trial. Tr. III85-86 (Fleetwood) (JA113-14). The local police acted independently in their questioning of Fleetwood, and no one ever suggested that Fleetwood was suspected of actual complicity in Blake's death. (By the time of Van Arsdall's trial, both the prosecution and defense knew that another person had been charged with Blake's murder.) The Delaware court did not decide whether Van Arsdall's cross-examination of Fleetwood on this point had been impermissibly limited, noting only that "an accused [should] be given some latitude to search for agreements or understandings. . . ." Pet. App. at A-6, n. 3.

the corner of the bed, playing with it for a little while and it took off." Tr. X45-46 (Van Arsdall) (JA145-46).

Departing from his earlier statements, Van Arsdall now testified that when Pregent later left the room, Epps and he had sexual intercourse, at her invitation, on the bed. Tr. X47 (Van Arsdall) (JA147.)[13] When Pregent returned, he and Van Arsdall resumed their conversation. Van Arsdall then went back to the version of events he had recounted in his second statement to the police, this time remarking that he had stopped to put his shoes on before attempting to stop Pregent's assault. Tr. X49-56 (Van Arsdall) (JA149-56). He then described the series of events occurring after Meinier opened the door, including his arrest and statements to the police. Tr. X57-70 (Van Arsdall) (JA157-64). Throughout all of his testimony, Van Arsdall never denied being at Pregent's apartment about 11:30 p.m. or sitting on the sofa bed.

c. Summation

Though Fleetwood's evidence placed Van Arsdall at Pregent's apartment about 11:30 p.m., the prosecutor in ing his arrest and statements to the police. Tr. X57-70 (Reed) (JA173), in a closing argument that takes 28 pages of transcript. Instead, the prosecutor focused on the inconsistencies of Van Arsdall's testimony, urging that the physical evidence alone, and particularly when viewed with the aid of the forensic expert's testimony, rendered Van Arsdall's account implausible. After noting that neither

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[13]In pre-trial discovery, Van Arsdall had been furnished results of hair and fiber analysis which indicated Epps' body hairs were on his underwear.

Epps' death, Van Arsdall's presence, nor the physical evidence were in dispute, Tr. XI8-15 (Reed) (JA169-72), he told the jurors that the case could be reduced to whether they believed Van Arsdall or the physical evidence. Tr. XI16-27 (Reed) (JA173-78).

Defense counsel, paralleling his opening comments, then proceeded to tell the jury "what is not in dispute." Tr. XI32 (Nicholas) (JA180-81). Admitting that someone had intentionally killed Epps, counsel continued:

> The defense does not dispute that Robert Van Arsdall was in Daniel Pregent's apartment and he was there when the murder occurred. There is no dispute about that. We do not dispute that after Doris Epps was murdered, Mr. Van Arsdall left Daniel Pregent's apartment carrying the murder weapon. His clothing at that time was splattered with blood. You heard one of the witnesses testify that his shirt looked as though he had a nosebleed.
>
> He walked across the hall carrying the murder weapon, and he knocked on Robert Fleetwood's door. There is no dispute as to that. The State has offered evidence to prove that is so.
>
> Nor do we dispute that after he entered Fleetwood's apartment and washed his hands, he told Mrs. Jane Meinier and Mark Mood that he had been in a fight, and he told them there was something wrong next door. There is no dispute as to that. None of these facts are in dispute.

Tr. XI32-33 (Nicholas) (JA181).

Having conceded that Van Arsdall had been at Pregent's apartment at the time of the murder, counsel then reviewed the testimony of the prosecution witnesses. Though suggesting that Fleetwood's recitation of his

glimpse into the apartment suffered from inconsistencies,[14] he concluded his analysis of that testimony stating:

> Saying that you do believe this testimony of Fleetwood's, what does it prove? It proves what he [Van Arsdall] has never denied. It proves what he has already testified to in this trial. It proves that he was at Danny Pregent's apartment before Doris Epps was murdered. That is what it proves.

Tr. X42 (Nicholas) (JA188-89). Later counsel, in summarizing his client's testimony, again conceded that Van Arsdall was present, detailing that he had returned at 11:30 p.m. and, soon thereafter, had been in the bedroom, on and near the sofa-bed. Tr. XI92-96 (Williams) (JA192-96). Throughout the defense summation, the dispositive issue was not cast in terms of Van Arsdall's presence, which was all that Fleetwood had established, but instead defined as Van Arsdall's participation in the crime.

3. The Delaware Supreme Court and The Automatic Reversal Rule

Either rejecting or refusing to consider 25 other claims of error, Pet. App. at A-3, the Delaware Supreme Court overturned Van Arsdall's convictions after concluding that the limitation of the cross-examination of Fleetwood violated the Confrontation Clause since it "prevented the jury

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[14] A few minutes later counsel would use Fleetwood's recitation of Pregent's earlier outburst to support his argument that Pregent had killed alone. Tr. XI42-43 (Nicholas) (JA189). Later, the defense would concede that the inconsistencies in the testimony of the prosecution witnesses, including Fleetwood, were not of "that great a significance." Tr. XI99 (Williams) (JA198).

from considering facts from which it could have drawn inferences about [his] testimonial reliability." Pet. App. at A-5. The court then turned to the State's argument that any error was harmless beyond a reasonable doubt since Fleetwood's testimony did no more than establish what Van Arsdall had repeatedly admitted, i.e., that he was in Pregent's apartment and sat on the bed. Pet. App. at A-6. While never disputing the State's claim that Fleetwood's evidence was, in retrospect, cumulative and hence unimportant, Pet. App. at A-6, the court refused to even consider the State's argument. Instead, the court held that because under its view of the Confrontation Clause "a blanket" prohibition against exploring potential bias through cross-examination is "a per se error," Van Arsdall's convictions had to be reversed without any examination of "the actual prejudicial impact of such an error." Pet. App. A-7.[15]

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[15]Even outside the context of its "per se error" doctrine, the Delaware court displays some confusion about the appropriate federal constitutional standard for reviewing any restrictions on cross-examination. In the early part of its opinion, the court refers to the jury's exposure to facts sufficient for it to draw inferences about the witness' reliability as a criterion for determining the existence of a Confrontation Clause error. Pet. App. A-5. Then, in its standard of review, the court uses the same criterion to trigger constitutional harmless error analysis. Pet. App. A-7 (quoting *Reed v. United States*, 452 A.2d 1173, 1176-77 (D.C. App. 1982)). If some bias cross-examination has been allowed but the trial judge has excluded other bias impeachment evidence as being cumulative, the language of the opinion yields paradoxical results. If the appellate court concludes that the jury had sufficient facts to infer bias, the initial language would suggest that the trial judge committed no constitutional error. However, under the controlling later language, the court would be compelled to reverse unless the prosecutor establishes that the prohibition against further cross-examination was harmless beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

Because the trial judge erroneously limited cross-examination of a witness whose testimony was mirrored by that of the respondent, the Delaware Supreme Court's decision, without inquiry into the witness' actual effect on the outcome of the trial, requires petitioner to repeat a nine day trial in which sixteen witnesses testified and seventy-five exhibits were introduced. The Constitution does not require the draconian remedy of automatic reversal when the cross-examination of one witness is restricted, thus foreclosing questioning about the prosecutor's dismissal of a traffic charge in order to facilitate the witness' appearance at the prosecutor's office to discuss his testimony. Consideration of the harmlessness of this type of error is consistent with this Court's decisions in *Harrington v. California*, 395 U.S. 250 (1969); *Schneble v. Florida*, 405 U.S. 427 (1972); and *Brown v. United States*, 411 U.S. 223 (1973). At some point, contrary to the approach of the Delaware court, the other evidence of guilt and the likely effect of the excluded impeachment evidence must be factored into the balance between the defendant's interests in the procedural safeguards of the Sixth Amendment and the societal costs of retrial.

This Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), does not mandate an automatic reversal rule for every limitation of cross-examination that somehow implicates the Confrontation Clause. Although a harmless error analysis, as defined by *Chapman v. California*, 386 U.S. 18 (1967), was not undertaken in *Davis*, notably the conviction was overturned only after the Court's review of the record revealed that the excluded impeaching cross-

examination had a "real possibility" of success and that the witness was "crucial." An outcome-determinative analysis has been either a component of the substantive description of the Sixth Amendment guarantees or employed under the *Chapman* harmless error test. Thus, nothing in the Confrontation Clause mandates an automatic reversal rule, and significant societal interests are served without sacrificing a defendant's interest in a fair trial when an outcome-determinative analysis is undertaken.

While the Court may wish to remand this case to the Delaware Supreme Court for consideration of the harmfulness of the error here, petitioner submits that the restriction on cross-examination of this witness did not materially affect the outcome because the witness' testimony was rendered insignificant, given defense counsel's opening argument and the respondent's own testimony.

ARGUMENT

RESPONDENT'S CONVICTIONS SHOULD NOT HAVE BEEN SET ASIDE WITHOUT INQUIRING WHETHER THE CONFRONTATION CLAUSE ERROR CONTRIBUTED TO THE VERDICT.

A. The prior decisions of this Court have rejected a remedy of automatic reversal, devoid of any inquiry into prejudicial effect, for erroneous restrictions on the cross-examination of a prosecution witness.

In the decision below, the Delaware Supreme Court held as a matter of federal constitutional law that if the

trial court forecloses a line of impeachment evidence during the cross-examination of *any* prosecution witness, it commits "per se" constitutional error mandating reversal without any examination of the actual prejudicial effect of the error on the outcome of the prescution. Pet. App. A-7.[16] It thus fashioned, and then applied to this case, a constitutional remedy of automatic reversal for any erroneous restrictions on cross-examination of any prosecution witness. That rule thus precludes any appellate inquiry whether the excluded impeachment evidence or the resulting, not fully impeached direct testimony was too insignificant, in the context of the other evidence, to have had any material bearing on the resulting verdict.

The Delaware court's analysis simply ignores the clear teachings of this Court's prior decisions rejecting a rule of automatic reversal for trial court rulings that erroneously limit or deny cross-examination of a prosecution witness. Such a rigid rule, used as in this case to reverse a conviction when the defendant effectively concedes the accuracy of the particular witness' testimony, imposes un-

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[16]Cross-examination has two main purposes: (1) to elicit additional facts that might qualify or explain the witness' direct testimony and (2) to impeach the witness' credibility by eliciting information reflecting on perception, memory, sincerity, and narration. E. Cleary, *McCormick on Evidence*, §§ 29, 33-47 (3rd ed. 1984). In turn, there are five generally recognized methods of impeachment, one of which is to demonstrate the witness' bias or interest. 3A J. Wigmore, *Evidence* § 943-69 (J. Chadbourn rev. 1970). While this case involves the exclusion of bias or interest evidence, the language of the Delaware court's opinion can be easily applied to restrictions on other areas of inquiry during cross-examination.

necessary burdens on the rational administration of a publicly respected criminal justice system while only minimally furthering the interests served by the Confrontation Clause.

Although a plurality of the Court has suggested that, as with the other provisions of the Sixth Amendment,[17] a demonstration of some degree of material prejudice arising from the absence of an opportunity to cross-examine is an element of a Confrontation Clause violation, this appeal does not require the Court to either define the elements of the violation or determine which party bears the burden of establishing the presence or absence of prejudice. *See Parker v. Randolph,* 442 U.S. 62, 72-73 (1979) (plurality opinion); *Dutton v. Evans,* 400 U.S. 74, 87-88 (1970) (plurality opinion). Even on the most defense-oriented standard, i.e., that the restriction on cross-examination was a constitutional error and the prosecution bears the burden to show that the error did not reasonably contribute to the verdict, the judgment of the court below must be reversed.

1. **Chapman v. California**

In *Chapman v. California,* 386 U.S. 18 (1967), this Court rejected the argument that the "denial of a federal

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[17]In other Sixth Amendment contexts, the Court has inquired, as an element of the violation, into the effect of the alleged defect on the result of the trial. *See Strickland v. Washington,* 104 S.Ct. 2052, 2067-69 (1984) (assistance of counsel); *United States v. Cronic,* 104 S.Ct. 2039, 2046 (1984) (assistance of counsel); *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867-71, 873 (1982) (compulsory process); *Barker v. Wingo,* 407 U.S. 514, 532 (1972) (speedy trial); *Washington v. Texas,* 388 U.S. 14, 16 (1967) (compulsory process).

constitutional right, no matter how unimportant, should automatically result in reversal of a conviction" so that "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful." *Id.* at 20, 21. While noting that in prior cases a rule of automatic reversal had been applied when a constitutional right basic to a fair trial had been infringed, *id.* at 23 & n. 8,[18] *Chapman* emphasized that nothing in the federal constitutional structure requires appellate courts to ignore the "very useful purpose" served by the harmless error doctrine when they fashion remedies for constitutional errors occurring during trial. An otherwise valid conviction need not be overturned unless the appellate court concluded "'there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" *Id.* at 24 (quoting *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963)). Thus, if in the setting of a particular case, a trial error is so unimportant and insignificant, with so little, if any, likelihood of having changed the result of the trial, it may, consistent with the federal Constitution, be deemed harmless. *Chapman,* 386 U.S. at 22.

Through its application of the harmless error doctrine to constitutional violations, *Chapman* commands the appellate courts to remain steadfast in their duty to protect the constitutional rights of the accused, but not to turn a criminal appeal "into a quest for error" by "extract[ing]

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[18]The majority did not elaborate which guarantees fall within that description except to note several precedents and identify the "right" infringed. Commentators have noted that no single theory for defining which "rights" fall within that category has emerged in any of the Court's subsequent decisions. *See generally* 3 W. LaFave & J. Israel, *Criminal Procedure* ¶ 26.6(d) (1984).

from episodes in isolation abstract questions of evidence and procedure." *Johnson v. United States,* 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring). Instead, a reviewing court has a duty "to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States v. Hasting,* 461 U.S. 499, 509 (1983). The procedural safeguards of the Fifth and Sixth Amendments do not guarantee the defendant a trial free of all possible error but only a trial free of harmful error. *Id.* at 508-09. *See also Bruton v. United States,* 391 U.S. 123, 135 (1968) ("'A defendant is entitled to a fair trial but not a perfect one'") (quoting *Lutwak v. United States,* 344 U.S. 604, 619 (1953)). Similarly, the defendant has no automatic right to an appellate remedy for trial errors fashioned without consideration of the countervailing societal interests. Reversal for errors that were harmless denigrates the state's legitimate desire to avoid costly retrials; threatens to cause criminal litigation to become interminable; and diminishes the public's respect for both the constitutional protections and the criminal justice system generally. *See Rushen v. Spain,* 104 S.Ct. 453, 455-56 (1983) (per curiam); *Hasting,* 461 U.S. at 509; *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934) ("There is danger that the criminal law be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction. . . .") (Cardozo, J.).[19] *See also United States v. Bagley,* 105 S.Ct. 3375, 3395 (1985) (Marshall, J., dissenting).

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[19]As Justice Traynor observed:

> Like all too easy affirmance, all too ready reversal is also inimical to the judicial process. Again, nothing

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2. Pre-Davis Decisions

Sixty-nine years before *Chapman,* during the era of automatic reversal for constitutional violations,[20] this Court, in *Motes v. United States,* 178 U.S. 458 (1900), ruled that the Confrontation Clause had been violated when a highly incriminatory, pre-trial statement made by an escaped co-conspirator had been admitted at trial. Although as a result of the error, the jury had heard the "testimony" of a witness totally immune from trial cross-examination, this Court refused to blindly apply a rule of automatic reversal that would result in a new trial for one of the several defendants. That defendant had taken the stand and, reciting facts consistent with those related by the absent witness, admitted his participation in the crime. Holding that "[i]t would be trifling with the administration of the criminal law," *id.* at 476, to reverse for such a trial error when the defendant had by his own testimony affirmed the reliability of the missing witness, this Court ruled the Confrontation Clause violation harmless.[21]

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> is gained from such an extreme, and much is lost. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.

R. Traynor, *The Riddle of Harmless Error* 50 (1970).

[20]See Saltzburg, *The Harm of Harmless Error,* 59 Va. L. Rev. 988, 999-1002 (1973).

[21]In the ensuing years, this Court would apply the harmless error doctrine to affirm a conviction where a hearsay statement of a declarant not presented for cross-examination had been erroneously admitted. *Lutwak v. United States,* 344 U.S. 604,

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Two years after *Chapman,* the argument that Confrontation Clause errors fell within the category, suggested in *Chapman,* 386 U.S. at 23, of generically harmful violations which require reversal without regard to the facts or circumstances of the particular case was rejected in *Harrington v. California,* 395 U.S. 250 (1969).[22] In *Harrington,* the jury heard, in violation of the Confrontation Clause,[23] the pre-trial statements of two co-defendants who did not testify. The statements implicated Harrington by placing him at the scene of the robbery. However, the Court affirmed Harrington's conviction, refusing to adopt for such errors involving a denial of the opportunity for cross-examination "the minority view in *Chapman* that a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evi-

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619 (1953). Even where it ultimately reversed convictions where trial rulings had erroneously precluded cross-examination, the Court did so only after determining that the error had a material effect on the outcome. *Gordon v. United States,* 344 U.S. 414, 422-23 (1953) (direct restriction on admission of impeaching prior inconsistent statement); *Krulewitch v. United States,* 336 U.S. 440, 444-45 (1949) (erroneous admission of hearsay).

[22]Harrington had specifically and extensively argued that a rule of automatic reversal was required because the Confrontation Clause's guarantee of cross-examination was a right basic to a fair trial. Brief of Petitioner at 12-40, No. 750, O.T. 1968. To support his assertion, he cited the language in *Brookhart v. Janis,* 384 U.S. 1, 3 (1966) that the denial of cross-examination was "constitutional error of the first magnitude" which "no amount of showing of want of prejudice would cure." *Harrington* rejected a rule of automatic reversal even though the Court had recently concluded that the *Bruton* rule was to be applied retroactively because the restriction on cross-examination was a "serious flaw" that "went to the basis of [a] fair hearing and trial." *Roberts v. Russell,* 392 U.S. 293, 294 (1968) (per curiam).

[23]*Bruton v. United States,* 391 U.S. 123, 127-28 (1968).

dence." 395 U.S. at 254 (citation omitted). Instead, after undertaking its own review of the record to ascertain "the probable impact of the two [uncross-examined statements] on the minds of an average jury," *id.,* this Court concluded that the error could not have contributed to the verdict, because the co-defendants' statements merely echoed what Harrington had admitted in his own pre-trial statement which had, without objection, also been presented to the jury.[24]

After *Harrington,* an automatic reversal rule for Confrontation Clause errors has continued to be rejected. The admission of a co-defendant's statements, in violation of *Bruton,* has been held harmless where after reviewing the entire record, the Court concluded that the "inadmissible statements . . . at most tended to corroborate certain details of [the] petitioner's comprehensive confession" which the jury had necessarily credited. *Schneble v. Florida,* 405 U.S. 427, 431 (1972). Similarly, the admission of a co-defendant's statement, misperceived by the trial judge as falling within the co-conspirator hearsay exception, while conceded to be a violation of the Confrontation Clause, has been found harmless where "[t]he testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury," including the defendant's own confes-

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[24]Indeed, the dissenters rejected a rule of automatic reversal for Confrontation Clause errors, emphasizing that "[t]he focus of appellate inquiry should be on the character and quality of the tainted [uncross-examined] evidence *as it relates* to the untainted evidence and not just on the amount of untainted evidence." *Harrington,* 395 U.S. at 256 (Brennan, J., dissenting) (emphasis added).

sion. *Brown v. United States,* 411 U.S. 223, 231 (1973). *Accord Parker v. Randolph,* 442 U.S. 62, 77, 80-81 (1979) (Blackmun, J., concurring) (admission of incriminating statements of co-defendants, not subject to cross-examination, harmless where each defendant confessed); *Dutton v. Evans,* 400 U.S. 74, 91-93 (1970) (Blackmun, J., concurring) (admission of a hearsay statement, while violative of Confrontation Clause, harmless because not prejudicial).

The Delaware court offered no explanation of why it felt that the *Chapman* harmless error standard, adopted in *Harrington,* was not controlling. It is difficult to find any distinctions which would justify a differing rule. The error is the same: the presentation of testimony without the opportunity for full cross-examination.

The court below could not reject *Harrington* simply on the basis of a perceived distinction of how the witness was rendered unavailable for full cross-examination. Analytically, the trial judge in this case underestimated the probative value of the proffered impeachment evidence or overestimated the interests in the trial proceeding expeditiously and accordingly sustained the prosecutor's objection to a requested line of defense cross-examination. Yet, in doing so, he had no greater culpability than those trial judges who overvalued the administrative convenience of joint trials and refused to grant the defendant's request for a severance as in *Harrington,* granted the prosecution's motion for joinder as in *Schneble,* or misconstrued the limits of the federal co-conspirator hearsay exception as in *Brown.*[25]

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[25]The Delaware approach also finds no support in the assumption that in a *Harrington* situation, a jury will readily see

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One need do no more than juxtapose the circumstances in *Harrington* to those here to see that the Delaware court's automatic reversal rule is wrong. In *Harrington,* a harmless error analysis was permissible even though (1) the jury had no opportunity to observe the demeanor of the declarant while he gave his narrative; (2) the statement was not made under oath in the courtroom; (3) the defendant had no opportunity to pursue any line of cross-examination; and (4) no record existed of the questions sought to be posed and the declarant's answers. Surely the same analysis can be undertaken where, as here, (1) the jury could observe the witness' demeanor during his recitation; (2) the witness testified under oath; (3) the defendant pursued other lines of impeachment cross-examination; and (4) a record exists of the precluded questions and the witness' responses.

3. Davis v. Alaska

The decision in *Davis v. Alaska,* 415 U.S. 308 (1974), purportedly relied upon by the court below, did not overturn *Harrington* to create a rule of automatic reversal for violations of the right of cross-examination encompassed

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the co-defendant's bias and interest, and hence the unreliability of his statement, while in the direct restriction situation, the jury may, without the restricted cross-examination, have no reason to suspect the bias or interest of the "normal" witness. That assumption of the jury's perception of bias of the co-defendant was rejected in *Bruton,* 391 U.S. at 136 n. 12; *id.* at 137-38 (Stewart, J., concurring). Indeed, if it could be assumed that the jury has such an ability to "discern" the bias or interest and hence to "see" the unreliability, the rule of *Bruton* is unnecessary. Secondly, a distinction cannot be drawn that in the *Harrington* situation the co-defendant may attack the veracity of his own statement. The co-defendant may continue to have an interest to focus his in-court attack on only the portions damaging to him, leaving intact those incriminatory of his accomplice.

by the Confrontation Clause. In *Davis,* this Court reversed a conviction because the defendant was prohibited from using in his cross-examination of one Green, the fact that Green was on probation as a juvenile delinquent at the time of his pre-trial identifications of the defendant. The Court concluded, on the basis of the facts presented, the defendant had been "denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " *Id.* at 318 (quoting *Brookhart v. Janis,* 384 U.S. 1, 3 (1966)).[26] But this finding came only after the Court, on its own review of the record, had concluded: 1) that Green "was a crucial witness for the prosecution," 415 U.S. at 310, whose testimony "provided 'a crucial link in the proof . . . of petitioner's act,' " 415 U.S. at 317 (quoting *Douglas v. Alabama,* 380 U.S. 415, 419 (1965)), so that "[t]he accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner," 415 U.S. at 317; and 2) that there was a "real possibility" that pursuit of the excluded line of impeachment evidence would have done "[s]erious damage to the strength of the State's case." 415 U.S. at 319. That language indicates that *Davis* did not hold that all lines of cross-examination of all witnesses were equally protected by the Confrontation Clause so that reversal is required if the cross-examination of any witness has in some way been impaired. Instead, *Davis,* by defining the error as the denial of the right of *effective* cross-examination, speaks in terms of reversal only for material er-

[26]The *Brookhart* language originated as a concession made in a party's brief.

rors.[27] Constitutional error of the first magnitude occurs when relevant cross-examination of a key witness has been restricted to the point that the defendant's ability to show unreliability has been rendered "ineffective."[28]

Instead of a rule of automatic reversal, *Davis* suggests the appropriate two-level focus to review erroneous restrictions on cross-examination. In order to reverse, an appellate court must first find, in the context of all the evidence, that there is a substantial reason to believe that the excluded impeachment evidence would have affected the jury's judgment of the witness' credibility, i.e., that it would have weakened the impact of the witness' testimony. If so, the court must then find that the not fully impeached, and hence tainted, direct testimony was of such significance that there was a reasonable possibility the defendant would not have been convicted without it.[29] Unless the ap-

[27]Thus, in speaking the right to the *effective* assistance of counsel under a companion clause of the Sixth Amendment, this Court has emphasized that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *United States v. Cronic,* 104 S.Ct. 2039, 2046 (1984).

[28]Because in *Davis,* the defendant's guilt or innocence hinged almost exclusively on the fact-finder's evaluation of Green's testimony, and the excluded evidence was so damaging, the Court could easily equate the restriction to a denial of all cross-examination, as in *Brookhart.*

[29]*See* Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of* Davis v. Alaska, 73 Mich. L. Rev. 1465, 1472-73 (1975). The above criteria dovetail with the conclusion of harmless error in *Harrington.* When the error precludes cross-examination entirely, with no record of the questions to be answered, the first prong must by necessity be answered in the negative. Thus, the reviewing court must determine whether, as in *Harrington,* the unimpeached testimony contributed to the verdict.

pellate court, upon review of the entire record, can make both of these findings,[30] "it cannot be said that the conviction . . . resulted from the breakdown in the adversary system that renders the result unreliable," and hence constitutionally deficient. *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984).[31]

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[30]The reviewing court must also consider whether a countervailing state interest overrode the defendant's right to cross-examination in the particular case. No decision by this Court suggests that all testimonial privileges (e.g., attorney-client privilege), the government's several privileges to prevent disclosure of certain types of information (e.g., identity of informants), or evidentiary rules of relevance (e.g., Rule 403 of the Federal and Delaware Rules of Evidence) can never create a constitutionally appropriate restriction on cross-examination. *Cf. Davis*, 415 U. S. at 321 (Stewart, J., concurring) (no federal right created in all cases to impeach general credibility of witnesses through cross-examination about past convictions or delinquency adjudications).

[31]The majority of the lower courts have accepted this reading of *Davis* rather than a rule of automatic reversal for any restriction. Thus, they have found restrictions on cross-examination errors harmless where there was little likelihood that the excluded evidence would have altered the fact-finder's assessment of credibility. *See, e.g., United States v. Gambler*, 662 F.2d 834, 840-42 (D.C. Cir. 1981); *Kines v. Butterworth*, 669 F.2d 6, 11-13 (1st Cir. 1981), *cert. denied*, 456 U.S. 980 (1982); *United States v. Garza*, 754 F.2d 1202, 1206, 1208 (5th Cir. 1985); *Carrillo v. Perkins*, 723 F.2d 1165, 1172-73 (5th Cir. 1984); *United States ex rel. Scarpelli v. George*, 687 F.2d 1012, 1013-14 (7th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *Ransey v. State*, — Nev. —, 680 P.2d 596, 597-98 (1984) (per curiam); *State v. Pierce*, 64 Ohio St.2d 281, 290, 414 N.E.2d 1038, 1043-44 (1980) (per curiam); *State v. Patterson*, 656 P.2d 438, 439 (Utah 1982). Other courts have held restrictions on impeachment cross-examinations harmless where the error involved a "merely buttressing prosecution witness," *United States v. Duhart*, 511 F.2d 7, 9 (6th Cir.), *cert. dismissed*, 421 U.S. 1006 (1975); *see also United States v. Smith*, 748 F.2d 1091, 1096 (6th Cir. 1984), or where the witness gave testimony consistent with the defendant's own recitation. *Snyder v. Coiner*, 510 F.2d 224, 227-28 (4th Cir. 1975).

Davis followed a long line of opinions of this Court which have reversed convictions for Confrontation Clause violations not where "the prejudice in the denial of the right of cross-examination constituted a mere minor lapse," *Douglas*, 380 U.S. at 420, but only where the defendant had been denied effective cross-examination of a key prosecution witness who gave crucial testimony. *See, e.g., Smith v. Illinois*, 390 U.S. 129, 131 (1968) (trial court "emasculated" cross-examination by precluding rudimentary inquiry on cross-examination concerning the real name and address of the "principal witness" who was the only prosecution witness to testify to the "crucial events" and did so in a manner entirely different from the defendant); *Alford v. United States*, 282 U.S. 687, 688-89 (1931) (trial court precluded inquiry aimed at showing informant status of witness who gave uncorroborated "damaging testimony" including contents of conversations with defendant when others were not present). *See also Douglas*, 380 U.S. at 419 (defendant denied cross-examination where prosecutor read accomplice's statement which provided "crucial link" in proof and only "direct evidence" of defendant's acts and his intent); *Pointer v. Texas*, 380 U.S. 400, 410 (1965) (admission of preliminary hearing testimony of robbery victim precluded cross-examination of "chief" prosecution witness); *Barber v. Page*, 390 U.S. 719, 720 (1968) (admission of preliminary hearing testimony of accomplice precluded cross-examination of "principal evidence" incriminating defendant); *Bruton*, 391 U.S. at 127-28 (co-defendant's statement "added substantial, perhaps even critical weight" to prosecution's case).

The court below is unclear on the question of whether the evidence of the dismissal of the traffic charge would have affected the jury's assessment of Fleetwood's cred-

ibility. Although it speaks in such terms when defining the substantive violation, the court's finding about the excluded impeachment evidence in this case focuses exclusively on the nature of that evidence and discusses in the abstract whether the evidence was relevant. The Delaware court though quite clearly refused to make *any* inquiry whether, even under the most stringent degree of possibility, Fleetwood's testimony played a part in the resulting conviction. That decision was clearly erroneous.

4. Giglio v. United States

Respondent may urge that the Constitution commands the automatic reversal rule because it is unfair for the prosecutor to exercise his exclusive prerogative and dismiss charges in return for a witness' appearance at his office for pre-trial preparation and then prevent the defendant from placing that conduct before the jury. If that is the premise underlying the judgment below, it too is inconsistent with the prior opinions of this Court. Initially, the argument, focusing on the culpability of the prosecutor rather than the fairness and reliability of the trial, overlooks the fact that the exclusion of the impeachment evidence offered by the defense is not a unilateral decision of the prosecutor. A restriction on defense cross-examination is ultimately a decision of the trial judge. The prosecutor can only lodge his objection. Unless this Court views all trial judges as instruments of the prosecution bent on subverting the defendant's ability to present a defense, the rule of automatic reversal is an unneeded medicament.

Secondly, even assuming that the trial judge and prosecution should be viewed as partners, and further assuming that the prohibition on the defense exposure of the

witness' cooperation with the prosecutor is conduct similar to an affirmative misrepresentation to the jury of a lack of any testimonial motivation, a remedy of automatic reversal is not constitutionally compelled. Indeed, even where the prosecutor affirmatively misrepresents to the jury that the government had made no prosecutorial concessions for a witness' testimony, this Court has refused to find that a new trial is necessarily required. Rather a conviction is vulnerable only if the inaccurate picture of credibility "'could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Giglio v. United States,* 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois,* 360 U.S. 264, 271 (1959)). *See also United States v. Bagley,* 105 S.Ct. 3375, 3381-82 (1985); *United States v. Agurs,* 427 U.S. 97, 103 (1976). If, in the context of the entire record, a possibly inaccurate portrayal of the witness' credibility was not materially harmful, the prosecutor's conduct in creating the relationship and then lodging an objection does not in itself require a new trial.

B. A rule of automatic reversal is particularly inappropriate where the respondent conceded the facts related by the not fully impeached witness.

As the above litany demonstrates, the prior decisions of this Court have repeatedly rejected the position of the court below, i.e., that Confrontation Clause errors are the type of error that can never be found harmless. Yet, even if the Delaware court fashioned its rule of automatic reversal out of a concern that the Confrontation Clause precluded it from usurping the jury's function of assessing the effect of any piece of evidence on a witness' credibility, it clearly erred when it rigidly applied that rule to this

situation where the witness' testimony was "cumulative" of facts which Van Arsdall had conceded in both his testimony and argument during the trial.[32]

To apply a rule of automatic reversal in the "cumulative evidence" situation is to lose sight of the underlying purpose of the Confrontation Clause. The right of confrontation, like the other procedural commands in the Sixth Amendment, is a safeguard to ensure both the fairness and accuracy of criminal trials. *Ohio v. Roberts,* 448 U.S. 56, 65 (1980); *Dutton v. Evans,* 400 U.S. 74, 89 (1970) (plurality opinion). Neither of these goals is compromised when an appellate court determines that a restriction on cross-examination was harmless because the not fully impeached witness merely related facts independently conceded by the accused. In that situation, the accused has not been deprived of the ingredients necessary for an accurate decision by the trier of fact. While he may have been denied the ability to test the witness' reliability by cross-examination, by his own testimony, he has "afford[ed] the trier of fact a satisfactory basis for evaluating the truth of the [witness'] statement." *California v. Green,* 399 U.S. 149, 161 (1970).[33] Having himself conceded the facts related by the witness, the utility of cross-examination to make the witness a liar is minimal. *Parker v. Randolph,* 442

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[32]The congruence of the testimony is detailed at pages 7-15 of this brief. *See also* App. 1-2.

[33]Similarly, an erroneous presumptive jury instruction, which generally undermines the jury's exclusive province to determine the relationship between facts, may be found harmless where the defendant has conceded the existence of the element to which it relates. *Connecticut v. Johnson,* 460 U.S. 73, 87 (1983) (plurality opinion). *Cf. Hopper v. Evans,* 456 U.S. 605, 612-14 (1982) (omission of instruction on lesser offense, usually necessary for fair trial in capital case, harmless where defendant by own testimony negated consideration of lesser offense).

U.S. 62, 73 (1979) (plurality opinion) ("Successfully impeaching a [witness' testimony] on cross-examination would likely yield small advantage to the defendant whose own admission [of the same facts] stands before the jury unchallenged.")

Secondly, an appellate court's finding that the restriction on cross-examination was harmless in this "cumulative" situation does not usurp the jury's role of determining the credibility of any particular witness or the ultimate determination of guilt or innocence. Because the focus of the inquiry in the "cumulative evidence" situation is on the effect of the witness' direct testimony as it dovetails with indisputable evidence, the appellate court is not called upon to assess the damaging impeaching effect of any piece of evidence. Nor, in that situation, is the appellate court called upon to weigh all the evidence to conclude that any jury would have reasonably reached the same conclusion of guilt even in the absence of the error. Instead, a finding of harmlessness is simply an articulation of the common sense conclusion that when the accused conceded the accuracy of the witness' narration, the credibility or unreliability of the witness was not a determinative issue in the deliberations of the jury which convicted the accused.[34]

C. The restriction on Fleetwood's cross-examination and the resulting, not fully impeached testimony did not contribute to the jury's guilty verdicts.

This Court, if it agrees with the petitioner that the lower court's remedy of automatic reversal is erroneous, may prefer to remand to the state courts for the ultimate determination of the harmlessness of the cross-examination

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[34]*See generally* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale,* 125 U. Pa. L. Rev. 15, 37-61 (1976).

error. However, any review of the evidence will show that there is no reasonable possibility that the cross-examination error, as it may have tainted Fleetwood's direct testimony, contributed to the jury's verdict of guilt.[35]

As the Statement of the Case outlines, *supra* at 4-8, 12-15, and as the jury was told by defense counsel, the crucial issue in the prosecution was not whether Van Arsdall was present in Pregent's apartment when Doris Epps was killed but whether he participated in the homicide. Fleetwood's testimony relating his momentary glimpse of Van Arsdall in the bedroom at 11:30 p.m., at least one-half hour before the killing, simply did not speak to that determinative issue.

Prior to Fleetwood's appearance on the witness stand, defense counsel in his opening statement told the jury that Van Arsdall had returned to the apartment at 11:30 and had remained there until he carried the bloody knife into Fleetwood's apartment near 1:00 a.m. See Statement of the Case, *supra* at 7-8.[36] Before any witness had spoken, Van Arsdall had removed from dispute the issue of his

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[35]Because it is so clear that Fleetwood's testimony did not significantly contribute to the verdict, this Court need not decide whether the excluded impeachment evidence, the prior dismissal of a traffic charge, would have reasonably affected, in the context of the entire case, the jury's appraisal of Fleetwood's credibility.

[36]Counsel's comments to the jury conceding that Van Arsdall had returned to the apartment and was present during the murder were judicial admissions of fact conclusive in the case. E. Cleary, *McCormick on Evidence* § 267, at 791 (3d ed. 1984). *See also Chiarella v. United States*, 445 U.S. 222, 244-45 (1980) (Burger, C.J., dissenting).

presence in Pregent's apartment.[37] Thus when Fleetwood took the stand, his testimony that he had caught a glimpse of Van Arsdall in Pregent's apartment, see Statement of the Case, *supra* at 10-11, did not burst as a bombshell over the jury. Instead, it merely echoed defense counsel's own statements in opening argument. Moreover, as the trial developed, with the introduction of Van Arsdall's two pretrial statements and his promised trial testimony, Fleetwood's testimony vanished into insignificance. As outlined in the Appendix to this Brief, *infra* at App. 1-2, by the close of the evidence, the jury had heard from Van Arsdall almost every factual detail related by Fleetwood.[38]

By the time of summations, the crucial issue had not changed. Respondent's presence in the apartment re-

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[37]Because defense counsel's comments, conceding Van Arsdall's return at 11:30 p.m. and promising that Van Arsdall would testify, preceded any testimony, neither those remarks nor Van Arsdall's subsequent testimony were impelled by the Confrontation Clause error. *Cf. Harrison v. United States*, 392 U.S. 219 (1968) (subsequent trial testimony induced by prior constitutional error). Obviously, Van Arsdall's two pre-trial statements, in which he said he had returned before midnight, were not "fruits" of the subsequent trial error.

[38]The jury, without objection from Van Arsdall, had also heard Pregent's two statements. While Pregent did not say that Van Arsdall killed Epps, he did say that Van Arsdall had returned, in the late evening, to his apartment sometime after Epps had been placed on the bed. S.Exh. 72, at 2 (JA6-7), Tr. X9; S.Ex. 75, at 4 (JA45-46), Tr. X12-13. Moreover, Pregent said that he had gone across the hallway momentarily, leaving Van Arsdall and Epps in the apartment. When he returned, he laid on the bed, and Van Arsdall sat on some cushions adjacent to the bed. The two talked until Pregent went to sleep. S.Exh. 75, at 4-5 (JA45-49). He denied hearing or observing anything until he was awakened by the police. Pregent's statements dovetailed with Fleetwood's recitations and, in their description of the activities in the apartment near midnight, they traced Van Arsdall's recitations.

mained conceded. See Statement of Case, *supra* at 13-15.[39] Rather, as defense counsel emphasized to the jury, "the only issue that is in dispute at this trial is whether Robert Van Arsdall is responsible for the death of Doris Epps. That is the only thing that is in dispute. It is what you must decide." Tr. XI33 (Nicholas) (JA181).

When the jurors retired to deliberate, they had indeed heard Fleetwood testify that he had seen Van Arsdall in Pregent's apartment near 11:30 p.m. Admittedly they had not heard that the prosecution had dismissed a traffic violation brought against him after he agreed to come to the prosecutor's office to discuss the Epps murder. Yet, they had heard respondent say three times, in two pre-trial statements and from the witness stand, that he had returned near 11:30 p.m. They had also heard him say that soon after he had arrived, he sat on or near the sofa-bed, sharing a drink with Pregent and playing with his cat. They had heard defense counsel, before and after the evidence, emphatically state that Van Arsdall's presence in Pregent's apartment was not in dispute. Under these facts and circumstances, where Van Arsdall conceded all the facts related by Fleetwood in his not fully impeached testimony, this Court can without hesitation say that the tainted evidence "[did not] constitut[e] a substantial part of the prosecution's case," and thus could not "have played a substantial part in the jury's delibera-

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[39]In summation, defense counsel even said that his client had sat on the corner of the sofa-bed soon after he returned. Tr. XI92 (Williams) (JA193). The prosecution, in summation, only referred to Fleetwood's testimony in a single paragraph and never suggested that it showed anything except that Van Arsdall was in the bedroom near 11:30 p.m. Tr. XI16 (Reed) (JA173).

tion and thus contributed to the actual verdict reached . . . ." *People v. Ross,* 67 Cal. 2d 64, 84, 429 P.2d 606, 621 (1967) (Traynor, C.J., dissenting), *rev'd sub. nom. Ross v. California,* 391 U.S. 407 (1968) (per curriam). It requires nothing more than common sense to conclude that the cross-examination error did not contribute to the guilty verdicts.

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CONCLUSION

The judgment of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

COMPARISON OF TESTIMONY OF ROBERT FLEETWOOD AND ROBERT VAN ARSDALL CONCERNING VAN ARSDALL'S PRESENCE AFTER 11:00 P.M.

Fleetwood

a) Between 11:00 and 11:30 p.m., he walked across the hallway to Pregent's apartment. Sticking his head into the open doorway, he saw Van Arsdall sitting on the sofa-bed with Pregent's feet next to him. Tr. III49-50 (direct), 66-68 (cross) (JA82-83, 97-98).

b) He did not see the entire sofa-bed; he did not see Epps; and he did not talk to either Pregent or Van Arsdall. Tr. III52 (direct), 67-69 (cross) (JA84-85, 97-100).

c) After returning to his apartment, he "passed out" at 12:05 a.m. He awoke after the murder when the police were in his apartment. Tr. III53-54 (direct), 88-90 (cross) (JA 85-86, 115-117).

Van Arsdall

First Statement (S.Exh. 73)

a) He returned to Pregent's apartment near midnight, with Pregent opening the back door. On a sofa-bed was a woman. After Pregent and he talked for a time in the kitchen, they went into the bedroom. There, Pregent sat on the sofa-bed and he sat on cushions next to it. They talked until Pregent fell asleep. 1-3, 11-12, 17 (JA11-13, 22-23, 30).

b) With Pregent asleep on the bed, he went into the hallway for some air and encountered Meinier. He saw Epps' body when he went to return to Pregent's apartment. 12-13, 17-19 (JA11, 23-24, 30-32).

c) When he then went into Fleetwood's apartment, he saw Fleetwood asleep on the couch. 13-14 (JA 24-25).

Second Statement (S.Exh. 74)

a) He arrived at Pregent's apartment at 11:30 p.m. 1 (JA37).

b) Pregent told him to lay on the cushions next to the sofa-bed. Pregent lay on the sofa-bed next to Epps. 2 (JA37).

c) He was awakened and observed Pregent attacking Epps. 2-4 (JA 37-40).

Trial Testimony

a) At 11:30 p.m., he returned to Pregent's apartment. Tr. X41-42 (JA141-42).

b) He made some sandwiches, and Pregent and he talked for a while in the kitchen. They then went into the bedroom where he saw someone on the sofa-bed. He sat on the sofa-bed, had a drink with Pregent, and while sitting on the corner of the bed, played with a cat. Tr. X43-46 (JA143-46).

c) He then sat on the cushions next to the sofa-bed and talked to Pregent for awhile. Tr. X46 (JA 146-47).

d) After Pregent left the room for a few minutes, he had sexual intercourse with Epps. When Pregent returned, he sat on the cushions and again talked to Pregent. With Pregent on the bed, he went to sleep on the cushions. Tr. X46-49 (JA147-49).

e) He was subsequently awakened and saw Pregent enter the kitchen. After again falling asleep, he was re-awakened by Pregent attacking Epps. Tr. X49-56 (JA149-55).

f) After the attack he carried the knife into Fleetwood's apartment, told Meinier he had gotten into a fight, and that something was wrong across the hall. Fleetwood was asleep on the couch and could not be awakened. Tr. X57-62 (JA157-62).